

1972

## Commentary Upon the IUCN Draft Convention on the Export, Import and Transit of Certain Species of Wild

Barry Kowalski

Follow this and additional works at: <https://scholarship.law.edu/lawreview>

---

### Recommended Citation

Barry Kowalski, *Commentary Upon the IUCN Draft Convention on the Export, Import and Transit of Certain Species of Wild*, 21 Cath. U. L. Rev. 665 (1972).

Available at: <https://scholarship.law.edu/lawreview/vol21/iss3/10>

This Notes is brought to you for free and open access by CUA Law Scholarship Repository. It has been accepted for inclusion in Catholic University Law Review by an authorized editor of CUA Law Scholarship Repository. For more information, please contact [edinger@law.edu](mailto:edinger@law.edu).

## Commentary Upon the IUCN Draft Convention On the Export, Import and Transit of Certain Species of Wild

Representatives of what is expected to be a large number of the nations of the international community will meet in Washington, D.C. sometime in 1972 to agree upon a convention to control international traffic in endangered wildlife and plants. The International Union for the Conservation of Nature and Natural Resources (hereafter cited as IUCN) has developed a Draft Convention as a working document for such an international agreement. The purpose of this note is: (1) to trace the development of this country's domestic law and international agreements in regard to the control of traffic in wildlife, (2) to present a synopsis of the IUCN's Draft Convention, and (3) to analyze that draft in light of alternative methods to control international traffic in endangered wildlife and similar efforts to control other types of international traffic.

Although habitat loss and degradation is the primary danger confronting the endangered species of wildlife, international trade, both legal and illegal, in these species and products derived from them contributes greatly to the threat of their extinction. For example, eight species of whales were added to the United States Endangered Species List in December, 1971, exclusively because of overcommercialization.<sup>1</sup> The fact that the large cat skin trade, affecting some endangered species of cats, approaches thirty million dollars per year indicates the economic importance of such trade.<sup>2</sup>

Wildlife conservationists will not be content with only an international control of export and import of species threatened with extinction. Effective conservation of these species will require additional measures within the nations of the international community, which will protect essential habitat from exploitation and pollution by man. Sovereign nations, however, cannot be forced into action. A natural resistance to efforts to control internal lands and activities must be expected. Limitation upon international commercial traffic, because it involves control of extraterritorial operations, is less abrasive. It is an area in which we can reasonably expect to achieve agreement. Consequently, in seeking broad international agreement to conserve endangered species, inter-

---

1. See 35 Fed. Reg. 233 (1970).

2. *The Spotted Cats: In Danger—Or In Danger of Danger*, paper presented by Norman Myers, School of Forestry and Conservation, Univ. of Cal., at Int'l Symposium on the Ecology, Behavior, and Conservation of the World's Cats, March 1971.

national traffic is the most practical point to begin.

### *Part I. The United States Experience*

#### *The Lacey Act*

The Lacey Act, passed by Congress in 1900, was this country's first step toward regulation of international traffic in wildlife.<sup>3</sup> The primary motivation for this statute appears to have been the desire to protect American crops from exotic (non-native) animals which were finding their way into this country through international trade.<sup>4</sup> Consequently, the Lacey Act prohibited the importation of certain species of foreign wildlife and empowered the Secretary of Agriculture with the authority to effect a ban upon the importation of other birds and wild animals by declaring them injurious to agriculture and horticulture.<sup>5</sup>

Under the original Lacey Act it was unlawful to transport interstate any animal whose importation was prohibited.<sup>6</sup> Also prohibited was interstate transportation of the carcass or parts of an animal killed in violation of state, territory, or district law.<sup>7</sup> This provision was extended by a 1935 amendment,<sup>8</sup> making it unlawful to import mammals and birds taken or exported illegally from a foreign country.

Today, the Lacey Act continues to prevent the importation of injurious animals and to control interstate traffic.<sup>9</sup> Additionally, all wildlife (*i.e.*, any wild mammal, wild bird, amphibian, reptile, mollusk, or crustacean) or part therefrom or product thereof, "taken" or shipped contrary to foreign law, may not be imported into this country.<sup>10</sup> There is also a provision in the current Lacey Act providing for humane transport of wildlife.<sup>11</sup>

#### *Migratory Bird Treaties*

By virtue of international agreement, those birds which migrate across North

---

3. 18 U.S.C. §§ 42-44 (1970) (originally enacted as Act of May 25, 1900, ch. 553, §§ 2-5, 31 Stat. 187).

4. Act of May 25, 1900, ch. 553, § 2, 31 Stat. 187. By 1900 the European starling, not native to North America, had become a major threat to American agriculture. That species plus several others were the primary targets of this Act.

5. *Id.* Today the Secretary of the Interior has authority to effect such ban. See 18 U.S.C. § 42 (1970).

6. Act of May 25, 1900, ch. 553, § 3, 31 Stat. 187.

7. *Id.*

8. Act of June 15, 1935, ch. 261, tit. II, § 202, 49 Stat. 380.

9. 18 U.S.C. §§ 42-43 (1970).

10. *Id.* § 42. The word "taken" is amplified to include "captured, killed, collected or otherwise possessed."

11. *Id.*

America are afforded protection under the Migratory Bird Treaty Act.<sup>12</sup> The Migratory Bird Treaty Act constitutes enabling legislation for two bilateral treaties, one with the United Kingdom on behalf of Canada<sup>13</sup> and the other with Mexico.<sup>14</sup>

By Act of Congress in 1913, direct federal protection which included regulation of interstate foreign traffic, was extended to particular species of migratory birds.<sup>15</sup> This 1913 Act, however, was found unconstitutional.<sup>16</sup> In so acting, two federal District courts upheld state arguments that migratory birds were owned by the state in which they were found and that consequently their regulation was wholly within state jurisdiction.<sup>17</sup> Shortly thereafter, the 1918 Migratory Bird Treaty Act,<sup>18</sup> almost identical to the 1913 Act, was upheld by the Supreme Court of the United States<sup>19</sup> on the grounds that its purpose was to give effect to the recently concluded treaty between the United States and Great Britain.<sup>20</sup> Among other things, this treaty expressed agreement to prohibit all international traffic in migratory birds (or their eggs) specifically named in the treaty which were taken or shipped at any time contrary to the laws of a state or province. To supplement this Lacey Act-styled control, the parties agreed to prohibit the export of any species of migratory bird (or its eggs) specified in the convention during a "close season" prescribed within the provisions of the treaty. The close season export ban was independent of local law. Here was a twofold approach to determining what animal traffic should be prohibited: (1) that taken or shipped contrary to local law, and (2) that expressly proscribed by international agreement.

In 1936 a bilateral Migratory Bird Treaty was signed by the United States and Mexico.<sup>21</sup> Its regulation of international traffic was not as far-reaching as that provided by the Great Britain treaty. By this Treaty it was agreed not to permit the transportation across the Mexican-American border of migratory birds, dead or alive, their parts or products, without a permit of authorization by the government of both countries. However, this border traffic control was also extended by Article V of the Convention to game mammals.

---

12. 16 U.S.C. §§ 703-11 (1970) (originally enacted as Act of July 3, 1918, ch. 128, 40 Stat. 755).

13. Migratory Bird Agreement with Great Britain, Aug. 16, 1916, 39 Stat. 1702 (1916), T.S. No. 628.

14. Migratory Bird Agreement with Mexico, Feb. 7, 1936, 50 Stat. 1311 (1937), T.S. No. 912.

15. Act of Mar. 4, 1913, ch. 145, 37 Stat. 847.

16. *United States v. McCullagh*, 221 F. 288 (D. Kan. 1915); *United States v. Shauver*, 214 F. 154 (E.D. Ark. 1914).

17. 221 F. at 293-94; 214 F. at 157-59.

18. Act of July 3, 1918, ch. 128, 40 Stat. 755.

19. *Missouri v. Holland*, 252 U.S. 416 (1920).

20. *Supra* note 13.

21. *Supra* note 14.

The present day Migratory Bird Treaty Act<sup>22</sup> gives effect to both bilateral conventions. Criminal punishments are established for violations of the provisions of these international agreements and appropriations are authorized to accomplish their purposes.

#### *The 1940 Western Hemisphere Convention*

In 1940 the United States signed a multilateral international agreement, The Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere,<sup>23</sup> with most members of the Pan American Union. The Convention expresses an agreement among the parties to adopt appropriate measures to protect both wildlife and wild flora generally, and species included in the Annex to this Convention specifically. Article IX requires contracting parties to take necessary measures to regulate the import, export, and transit of "protected flora or fauna." The measures called for are (1) the issuing of permits authorizing the exportation or transit of species, listed in the Annex, or parts thereof, and (2) the prohibition of the importation of any species protected by the country of origin. The Lacey Act met requirement number (2) above, but the permit system of requirement number (1) did not materialize in this country. Although this Convention was entered into force for the United States in 1942, no specific enabling legislation was ever adopted by the Congress.

#### *Endangered Species Acts*

Until the Endangered Species Conservation Acts of 1966 and 1969,<sup>24</sup> the Lacey Act and the Migratory Bird Treaty Act constituted this country's only regulation of international transit of wild animals. Prior to 1966, species facing extinction was afforded protection from the threat of injurious international trade only if the taking or shipping of that species violated a state or foreign law, or if it was a species to which the provisions of the aforementioned migratory bird treaties were applicable.

The Endangered Species Act of 1966 recognized wildlife threatened with extinction as a distinct kind of wildlife, to be afforded special attention.<sup>25</sup> The Secretary of the Interior was directed to maintain a list of native endangered species.<sup>26</sup> The Secretary was authorized by the Act to conduct research on

---

22. 16 U.S.C. §§ 703-11 (1970).

23. 56 Stat. 1354 (1942), T.S. No. 981.

24. 16 U.S.C. §§ 668aa-668cc(6) (1970), *amending* 16 U.S.C. §§ 668aa-668ee (Supp. 1966). The statute consists of §§ 1-3 of the Act of Oct. 15, 1966, 80 Stat. 926, *as amended by* § 12 of the Act of Dec. 5, 1969, 83 Stat. 275, and includes §§ 1-5 of the latter Act.

25. 16 U.S.C. §§ 668aa-668ee (Supp. 1966), *as amended* 16 U.S.C. §§ 668aa-668cc(6) (1970).

26. *Id.* § 668aa.

native endangered wildlife, engage in captive propagation, and acquire habitat.<sup>27</sup> The legislation was not directed towards control of endangered species traffic, but was confined to native wildlife. This exclusion is the subject of the Endangered Species Conservation Act of 1969, which amended the 1966 Act.<sup>28</sup> It directs the Secretary of the Interior to develop a list of species in danger of worldwide extinction and permits the importation of species included in such a list only for very limited purposes.

It should be noted that the protection afforded by the 1969 Act applies only to non-native species. There is no restriction on the export of native endangered species. That is, if the Lacey Act or the Migratory Bird Treaty Act do not apply to a particular species of endangered American wildlife, it may be exported from this country. Consequently, unless a state law prohibits the taking of a native endangered species, or the species is a migratory bird specifically banned from international trade by treaty, that species, although endangered, may be exported.

Of particular significance to this study is Section 5(b) of the 1969 Act.<sup>29</sup> This congressional directive, calling for "a binding international convention on the conservation of endangered species," was the impetus for the upcoming conference on international traffic in endangered species.

#### *Part II. The IUCN Draft Convention on the Export, Import, and Transit of Certain Species of Wild Animals and Plants*

The preamble to the Draft Convention<sup>30</sup> assets its design to regulate traffic in threatened and declining species of wild animals and plants in order to control the hunting, killing, capturing, and collecting of these species. The Draft sets out to accomplish this purpose through explicit regulation of the trade in species that are included in an Annex to the Draft. That Annex is divided into two categories: those species that are already threatened with worldwide extinction, and those which are approaching that condition. Control of traffic in the former category of species is, of course, stricter than control over the traffic in the latter.

Regulation is primarily at the point of origin through the institution of export permits for both categories, with control exercised by a competent scientific authority designated in the exporting country who will limit the num-

---

27. *Id.* § 668bb.

28. 16 U.S.C. §§ 668aa-668cc(6) (1970), *amending* 16 U.S.C. §§ 668aa-668ee (Supp. 1966).

29. *Id.* § 668cc(5).

30. The International Union for the Conservation of Nature and Natural Resources transmitted to the United States Department of Interior a Revised Draft of a Convention on the Export, Import and Transit of Certain Species of Wild Animals and Plants in July 1971.

ber of permits granted in order to avoid over-exploitation. Export is allowed only to other contracting states and export permits are to be issued only for specimens which have been lawfully killed, captured, or collected, or in the case of re-export, after proof of lawful import has been provided. In the case of already endangered species, a further regulation is included by the prerequisite of an import permit, issued under the control of a scientific authority in the import country, and authorized only when adequately justified and then only for scientific purposes.

Both export and import permits, must conform to sample permits provided in an Appendix to the Draft. Permits are also required to be submitted every six months to a Continuing Bureau, created by the contracting parties to carry out administrative details.

Contracting states are to prohibit and penalize trade in specimens and their products in violation of the Convention. Exhibition and offering for sale of material illegally imported are to be prevented, and provisions made for confiscation of such material.

Specimens in a traveling exhibition, including a circus, can be exported or imported without a permit, provided that proof is furnished that acquisition took place before the Convention was in force or was in accordance with the Convention if the acquisition took place after that date.

An Advisory Committee with members selected by the contracting parties is called for in the Draft. This committee may arrange for studies relating to the Convention. It is to review species listed in the appendices, to report to the representative of the contracting parties, and to provide contracting states with scientific and technical information. Parties to the Convention are required to meet every three years to review the operation of the Convention and to examine any report or matter presented by the Advisory Committee. The contracting states are obligated to make annual reports to the Advisory Committee on the implementation of the Convention within their territories, to include legislative and other measures taken, the number of export and import permits issued for each species, and the results of an enforcement proceedings undertaken.

The Convention does not prevent contracting states from imposing stricter measures affecting trade in specimens or their products than under the Convention, or from applying the provisions of the Convention to additional species, or from imposing the stronger control measures for already endangered species to those species approaching that condition.

The Draft has a rather complex enforcement provision to guarantee compliance by the contracting parties. This shall be critically discussed later in the study.

*Part III. Comments on the IUCN Draft*

The upcoming Conference is the first full-scale effort to commit the world's nations to the protection of wild creatures which man's presence and activities have threatened. The IUCN Draft is only a proposed agreement and as such is subject to partial alteration or complete rejection. The following discussion is intended to raise questions as to the adequacy of the provisions of the Draft and to provide alternatives for consideration.

*Selection of Species to be Protected*

The Draft Convention reflects one of two alternative methods for determining which species will be afforded the benefit of international control. Under its provisions, control is extended over traffic in those species which the contracting parties agree to include in the two categories of the Convention's appendices. Selection of specific species as the subjects of traffic regulation is also the approach taken by the Endangered Species Conservation Act of 1969.

In contrast, there is the Lacey Act. It regulates traffic in those species which are protected by the local law of the country of their origin.

Obviously there are advantages and disadvantages to both methods. A list of endangered species provides certainty as to which wildlife species do and which do not qualify for import and export regulation. Presumably, scientific authorities would be afforded the opportunity to develop a scientifically sound list of wildlife threatened with extinction. This has been the general effect of the 1969 Endangered Species Conservation Act. However, this method is probably better suited for domestic regulation where one nation, one sovereign, can decide the components of such a list. Under the IUCN Draft, the determination of which animals are to be protected from uncontrolled international traffic will be a matter requiring international agreement. This will present problems. Due to lack of international agreement, the list of endangered animals could be watered down. Not all nations possess the same concern for wildlife conservation. Certain countries will oppose the inclusion of certain species in response to pressure from domestic economic interests. Certain nations will not agree with the scientific findings of others. Also, certain species, admittedly not endangered on a worldwide scale, but endangered in a particular country, will not be protected. The net result could be that a large number of animal species deserving of protection from international trade will not be protected.

The Lacey Act approach eliminates the need for international agreement upon which particular species to protect. If incorporated, it would obligate the parties to import only those species taken or shipped in agreement with the local laws of the contracting state wherein a particular species resides. However, there are many practical problems connected with application of the



Lacey Act. Foremost is identification of foreign law. The United States has had a difficult time determining what laws exist in foreign jurisdictions. Not only are there national laws in regard to wildlife, but also in many cases there are provincial and even municipal laws. Identification of existing law does not end the problem. Interpretation of foreign law is hazardous.<sup>31</sup> A foreign regulation which may appear to be an obvious prohibition against export, may not be so interpreted by the foreign country which enacted that regulation.

The Lacey Act approach does not limit traffic control to species in danger on a worldwide scale. It allows an individual nation to determine which of its own native species to protect. Consequently, a species endangered only locally could be afforded protection from trade under a convention following the Lacey Act approach. On the other hand, species endangered worldwide would fall within the protection of a convention, limited to the Lacey Act approach, only if one of the countries of origin decided to afford legal protection for that animal.

Recognizing the limitations of each approach, international agreements have tended to combine them. This two-fold approach was first advocated by the Migratory Bird Treaty between the United States and Great Britain. The most recent employment of this combination occurred in the African Convention for the Conservation of Nature and Natural Resources of 1969.<sup>32</sup> This Convention has an Annex listing "protected species." Article VIII of the Convention proscribes the hunting, killing, or capture of "protected species" throughout the territory of the contracting states.<sup>33</sup> To supplement this list, Article IX requires the contracting states to regulate trade in other species so as to prevent traffic in wildlife illegally captured or killed.

### *The Kenya Draft*

An alternative to the IUCN Draft has been formally advanced by Kenya.<sup>34</sup> Article II of this Kenya Draft<sup>35</sup> endorses protection for species already agreed

---

31. In an attempt to prosecute under the Lacey Act for the transgression of a foreign law regulating the exportation of tiger parts, it was discovered that a tiger skin was not considered a "part" of a tiger by the foreign country. According to foreign officials, the regulation applied only to parts still attached to "live" tigers.

32. Reproduced in *BIOLOGICAL CONSERVATION*, Vol. 2, Jan. 1970, at 105. This convention has not been reported in any compilation of international agreements.

33. This provision is not specifically directed toward control of international traffic, but rather "taking" within the country of origin. But, if a species could not be taken, presumably, it could not be exported.

34. Kenya has circulated to the international community an amended version of the IUCN Draft and designated it the Kenya Alternate Draft.

35. Article II of the Kenya Alternate Draft reads as follows:

to be endangered as a fundamental principle of the Convention. To this is added an agreement "not to permit the import of any wildlife the export of which is restricted as a wildlife protection measure by any other contracting state or states without verifying the legality of the export." Article III of the Kenya Draft<sup>36</sup> defines "wildlife export measures" to be those "national export measures" designed to "reduce or eliminate the killing of wildlife or its removal live from a nation." Exempted are those commercially motivated measures restricting export to protect local processing industries. The aim is to confine traffic control to those species protected by conservation measures and not to include species that are subject of regulation for purposes other than conservation.

An interpretation problem is created by the language of Article II when compared with the language of Article III. In the former article, the Kenya Draft limits the effect of the provision to a species shipped contrary to the laws of the country of origin. In other words, only illegal export would invoke the Convention's prohibition. However, Article III describes the local laws to which the Convention shall apply as those which restrict the killing of wildlife or its removal live. Is the Kenya Draft Convention then applicable to local laws prohibiting taking as well as exporting? Is it applicable only to export laws affecting live removal? Apparently the answer is no in both cases. Article II and Article III specifically refer to export measures. Article III considers the motive of the export measure. An export measure prohibiting live removal is designed to eliminate exactly what it expresses. At the same time, there can be export measures prohibiting the removal of parts or products of certain species. The design here would be to reduce or eliminate the killing of that species of wildlife. If the language of the Convention is viewed in this manner then Article II and Article III become consistent.

If, as theorized above, the Kenya Draft confines itself to the prohibition of

---

1. In order to enable the enforcement of wildlife protection measures not otherwise enforceable, the Contracting States agree not to permit the import of any wildlife the export of which is restricted as a wildlife protection measure by any other Contracting State or States without verifying the legality of the export.

. . . . .

3. Because some wildlife forms are already threatened with worldwide extinction, the Contracting States shall agree on a list of such wildlife forms, the export, import and transit of which shall be prohibited, with the exception of specimens for scientific or propagative purposes.

36. Article III of the Kenya Alternate Draft reads as follows:

The provisions of this Convention shall apply only to national export measures designed to reduce or eliminate the killing of wildlife or its removal live from a nation; the provisions of this Convention shall not apply to national export measures designed to discourage or prohibit the export of wildlife in one or more states of manufacture only, so as to foster its export in other states of manufacture.

importation of those species exported contrary to local laws, then it differs significantly from the original Lacey Act. The Lacey Act proscribes the import of wildlife "taken" or exported contrary to foreign law. Under the Kenya Draft, when a species is by domestic law protected from taking, yet free to be exported, the convention would not be applicable. However, if a country has recognized the necessity of preventing the killing of an animal, it is likely that it will also have accepted prohibition of export as well.

Article V of the Kenya Draft would require contracting states to annually convey to the depositary government a list of species protected by their wildlife export measures. Such a provision should eliminate the problems of identification and interpretation of foreign law which the Lacey Act has had to confront. It puts the impetus on the countries of origin to determine which of their laws or regulations they consider to protect species from export and to report the existence of these laws to the potential countries of import.

The fact that Kenya, a developing nation, has encouraged the combination of a Lacey Act approach to wildlife traffic control with the list of protected species approach, weakens the objection to the Lacey Act approach fostered by many of the European nations. The argument runs that the Lacey Act is based upon the inherent assumption that the country of origin cannot enforce its own laws. Consequently, the adoption of such an approach is deemed tantamount to announcing that the developing countries (wherein the majority of threatened species exists) are unable to control the taking and shipment of species which they have legislated to protect. Purportedly, this would be a blow to the sensitivities of these nations.

Recent evidence demonstrates, however, that the developing nations may not be as sensitive on this matter as has been assumed. Both the Kenya Draft and the 1969 African Convention indicate that at least the nations of Africa are willing to accept the Lacey Act approach.

#### *The Desirability of Combining Approaches*

The Lacey Act approach and the list of protected species approach are not mutually exclusive. They can exist together, and have in several recent international agreements. The strong points of one approach tend to compensate for the weaknesses in the other. Species which fail to be included in the protected list due to lack of international agreement can still be protected by the convention if their country of origin recognizes their plight. Species not in worldwide endangerment, but threatened locally, may receive convention protection if the country of origin desires their removal from international traffic. Species not protected by local law, may be included in the protected list, even over the objection of the country of origin. Unanimous approval need not be required.

Certain species in need of protection may not receive protection because the country of origin deems it unnecessary or inappropriate to ban exportation and because the parties to the convention fail to agree to add that species to the protected list. However, we can expect that more endangered species will be protected if the convention extends the effect of its provisions to species both agreed to be protected by contracting parties and unilaterally granted protection by their host country.

The Kenya Draft's alternative fits well the United States' effort to regulate international traffic in endangered species and could be easily incorporated into the IUCN Draft by the addition of a third appendix to include species selected for protection by individual contracting states. It would commit the other contracting states to the principles of our Lacey Act while eliminating the identification and interpretation of foreign law problems. It would completely ban traffic in certain particularly endangered species. It would partially fill the loophole in United States law allowing the export of endangered species. If a native American species appeared on the Convention's list then it could not be exported. However, because the federal government has refused to accept jurisdiction over non-migratory species,<sup>37</sup> endangered nonmigratory American species could still be exported unless they were on the Convention's list or protected from taking or shipment by state law.

#### *Enforcement of the Convention*

Probably the most significant shortcoming of the IUCN Draft Convention is Article XIV, the enforcement provision. To insure compliance with the provisions of the Convention, particularly to insure against excessive issuance of export permits, the Draft Convention has devised the following procedure. If the Advisory Committee believes that there has been a violation of a provision of the Convention or that a species is being endangered by the issuance of an excessive number of export permits, it may consult with the state concerned and, if it deems necessary, request that an inquiry be made. If an inquiry is allowed by the state in question and a suspected violation is confirmed, then the Committee shall consult with the state and suggest a remedy. If the contracting state does not agree to the initial inquiry or if the situation is not remedied after the inquiry, the Advisory Committee shall notify the representatives of the contracting states of this fact at their next regular meeting. The representatives are required to consider such a matter and are empowered to

---

37. For discussion of federal jurisdiction over wildlife see Note, *Federal Protection of Endangered Wildlife Species*, 22 Stan. L. Rev. 1289 (1970). A draft bill, the Endangered Species Conservation Act of 1972, a part of the environmental program announced by President Nixon on February 8, 1972, would extend federal jurisdiction to native endangered species.

decide whether to suspend the export, import, or transit of species and products of species covered by the Convention to or from the violating state until it again observes the terms of the Convention.

The primary weakness in this approach is that investigation and sanction involves time. If a violation occurs immediately after a regular meeting of the representatives of the contracting states, four years would expire before sanctions could be adopted against the violator to induce compliance with the spirit of the Convention. In four years a species could become extinct or certainly suffer irreparable harm.

There are several ways to remedy this inadequacy. The Convention could be amended to provide for special meetings of the representatives of the contracting states to determine whether action should be taken to induce compliance with the provisions of the Convention. Or, the Advisory Committee would be empowered with the authority to invoke sanction in those cases where the Committee deems immediate action is necessary.

The first alternative does not require the contracting parties to relinquish decision-making authority to an organ of the Convention. On the other hand, it is a somewhat slower process and would require the representatives of the contracting states to be on call for the extra meetings. The contracting states probably would not want to commit themselves to a procedure which would require their representatives to vote to rebuff another contracting state for some violation.

The second alternative is basically that adopted by the Protocol for Limiting and Regulating the Cultivation of the Poppy Plant, the Production of, International and Wholesale Trade in, and Use of Opium.<sup>38</sup> This international drug traffic control agreement was entered into force for the United States in 1963. The Convention created a Permanent Control Board which has the authority to impose an embargo on the import or export of opium from or to a party which has violated the Convention. This provides a powerful international organ.

If this method of enforcement were selected, procedural safeguards should be incorporated to protect the contracting parties from the possibility of arbitrary decision by the Advisory Council. The Opium Protocol provides for an appeal from a decision to impose an embargo.<sup>39</sup> This Convention created an Appeal Committee whose membership was appointed by the International Court of Justice. The subject Convention might utilize a similar method for handling an appeal. However, in this instance, the IUCN should appoint the

---

38. [1963] 1 U.S.T. 10, T.I.A.S. No. 5273.

39. *Id.* Art. 13.

Appeal Committee since it has the necessary expertise to select appeal board members. Following the issuance of an import ban, the affected state could be afforded a 30 day period to bring its appeal to a permanent appeal board, consisting of members who, by their competence and impartiality, will invoke general confidence. The appellant state and the Advisory Committee should be entitled to a hearing before such an appeal board. In any event, the decision of the appeal board should not be delayed any longer than 30 days after receipt of the appeal.

A special meeting of the representatives of the contracting states to consider a recommendation to impose an embargo would result in a decision emanating from the parties themselves. Consequently, the necessity of an appeal procedure does not exist under that system. But again, a time limit should be imposed upon a decision from the representatives of the contracting states. Because of the difficulty in convening a special meeting a period as long as four months might be necessary.

Next, it must be decided what force should be afforded a decision of the Advisory Committee or of the representatives of the contracting states to impose an embargo. Under the IUCN Draft, the decision of the representatives is merely a recommendation to the contracting states. There is no provision for what will happen thereafter. Such a procedure is inadequate. It can be expected that without some expressed procedure the recommendation will not receive timely consideration by the contracting states, and in many cases receive no consideration at all.

There are two alternatives. First, the decision of the Advisory Committee or the representatives could be considered binding upon the contracting parties. In this case, there should be language in the Convention including a time limit for commencement of the embargo. Sixty days would be a reasonable time. Alternatively, the contracting states may want to preserve their right to express a reservation to such a decision. If so, 60 days could be given the contracting states for review and consideration. The decision would be considered accepted, and such contracting states would be bound thereby, 60 days after the date of the communication, provided that any contracting state which expressed an objection to the decision within the 60-day period would not be bound. Whether one of these alternatives or some modification is found preferable, there must be a provision in the Convention to impose speedy sanctions. Otherwise, a decision to impose an import ban could be ineffective.

If an embargo does become effective, how long does it last? How is it terminated? The IUCN Draft lacks any procedure for concluding an imposed embargo. There must be some way to turn off what one turns on. To avoid confusion and dispersal of authority, the procedure for ending the embargo should coincide with the procedure for initiating it. The Advisory Committee

should follow the results of the embargo to determine when its purposes have been accomplished, *i.e.*, when the state concerned is again in compliance with the terms of the Convention. If the Advisory Committee is empowered with the authority to impose the embargo, it should have the authority to terminate it when it considers termination appropriate. If the Advisory Committee's function is limited to recommendations, then its determination that the embargo should be lifted should take the form of a recommendation.

Speedy termination of the embargo when it has accomplished its purpose is almost as important as speedy execution of the embargo in the first place. Once the embargo has been imposed, the state which is found to be a violator will have less incentive to mend its ways. To go back to the representatives of the contracting parties or the contracting parties themselves in order to gain agreement to suspend the embargo is a cumbersome process. For this reason, and because action through the Advisory Committee will in all cases provide more speed and flexibility, it would appear that the Advisory Committee is the best mode for handling enforcement of the Convention.

An effective enforcement provision may not be possible, however. Recent drug traffic control conventions indicate that the world community is not responsive to international agreement providing for imposition of embargoes against contracting parties found to have violated the terms of a convention. Although the 1953 Opium Protocol, discussed above, with its strong enforcement provisions is still in force, two more recent international agreements in this area have not adopted such strong enforcement. The Single Convention on Narcotic Drugs of 1961<sup>40</sup> and the Convention on Psychotropic Substances of 1971<sup>41</sup> contain enforcement provisions similar to those in the IUCN Draft Convention. In both cases the International Narcotic Central Board, a creation of the 1953 Opium Protocol, can make recommendation of embargo to the contracting states. At that point enforcement as provided by these conventions ends.

The most recent convention on the control of slavery,<sup>42</sup> which also deals with an attempt to control international traffic, has no provision to induce compliance by a contracting party. As important as it is to have an effective enforcement provision in the subject Convention, it may be a fact of life that it is unattainable.

---

40. [1967] 2 U.S.T. 1407, T.I.A.S. No. 6298.

41. The convention was signed in Vienna, Feb. 21, 1971, and transmitted by the President on June 29, 1971 to the United States Senate for advice and consent.

42. Supplementary Convention on the Abolition of Slavery, Nov. 9, 1967, [1967] 18 U.S.T. 3201, T.I.A.S. No. 6418.

### *Humane Transport*

An important provision of the Lacey Act is Section 42(c).<sup>43</sup> This section empowers the Secretary of the Interior to prescribe requirements for the humane and healthful transportation of wild animals. This section also makes it unlawful for any person to transport any wild animals under inhumane or unhealthful conditions or in violation of prescribed regulations.

To date no international agreement has addressed itself to the problem of inhumane shipment of wildlife. This Convention is an appropriate place for such a requirement. Traffic in endangered or soon to be endangered wildlife will not be absolutely proscribed by the Convention. The traffic that is allowable should be conducted under the guaranty of humane conditions. It is especially important to protect the health of individual members of species covered by this Convention. They represent a vanishing or diminishing race which can ill afford the loss of any of its individual members.

A provision should be added to this Convention requiring that species covered by the Convention be transported only under humane and healthful conditions. A detailed description of what would be required to fulfill humane and healthful conditions might be included in such a provision. Alternatively, the establishment of these details could be incorporated as an additional duty of the Advisory Committee.

### *Expansion of Advisory Committee's Authority*

The Advisory Committee as conceived under the Draft Convention is somewhat impotent. However, the contracting parties may find it desirable to allow this Committee to hold certain authority and to make certain decisions.

It has already been suggested that the Advisory Committee be empowered with the authority to impose an embargo whenever it considers it necessary that such action occur before a scheduled meeting of the representatives of the contracting parties. Humane transport could provide another possible area where the Advisory Committee's responsibility might be extended. If humane traveling conditions are agreed to be a requirement provided for by the Convention, the establishment of minimum conditions to be followed might be a proper concern for the Advisory Committee.

There are other matters which might properly be the province of the Advisory Committee. It could provide assistance to contracting states in preparing enabling measures to implement the requirements of this Convention. In this regard, it might prepare model enabling laws and regulations, similar to the

---

43. 18 U.S.C. § 42(c) (1970).



model permits of the appendix to the Convention.

The IUCN Draft confines the Committee to the role of providing information of a scientific and technical nature. This could be expanded to include information of a legal nature, such as advice on preparing enabling measures and advice regarding enforcement.

The Advisory Committee is required by the Draft to study the advisability of adding new species to the appendices and making recommendations in this regard to the contracting parties. It may have been an oversight that the Committee was not additionally instructed to study the advisability of removing certain species from the appendices. It must be recognized that in time particular species will recover from their threatened existence and it will no longer be desirable to restrict trade in those species. If the appendices are to have any integrity, some means should be available to remove these species from the list. It seems logical that the Advisory Committee could consider such prospects while investigating whether to add new species to the appendices.

### *Habitat Protection*

It should be remembered that the IUCN Draft has confined itself to the problem of international traffic in endangered species, even though this is not the primary threat to endangered species. As stated earlier, deprivation and destruction of habitat present the gravest danger to wildlife. Most animal species are products of a clean, fertile and productive environment. They are threatened with extinction when they are deprived of adequate food, pure water, and protection from the elements. They become endangered when chemical poisoning reduces their numbers or impedes their ability to propagate. They are threatened when man turns their environment to other uses.

The first global convention dedicated to conserving wildlife should deal to some degree with habitat loss and deterioration. At the least, the preamble to the Convention should make note of the predominance of this problem. It would be better if an agreement to implement efforts to protect wildlife habitat were included as one of the principles of the Convention.

It should not be thought that it will be impossible to include such a principle. After all, the African Convention of 1969 and the Pan American Convention of 1940 both include a dedication to the general principle of protection of habitat.<sup>44</sup>

---

44. The African Convention's Article VII makes the following commitment:

(1) The Contracting States shall ensure conservation, wise use, and development, of faunal resources and their environment, within the framework of land-use planning and

*Commitment to Future Agreement*

It is also recommended that an attempt be made to establish commitment to future agreements to protect habitat through the inclusion of a provision similar to Article IX of the Antarctic Treaty.<sup>45</sup> That Article provides that representatives of the contracting parties to the Antarctic Treaty should meet two months after entry into force of that Treaty for the purpose of formulating, considering, and recommending to their government measures in furtherance

---

of economic and social development. Management shall be carried out in accordance with plans based on scientific principles, and to that end the Contracting States shall:

- (a) manage wildlife populations inside designated areas according to the objectives of such areas and also manage exploitable wildlife populations outside such areas for an optimum sustained yield, compatible with the complementary to other land-uses; and
- (b) manage aquatic environments, whether in fresh, brackish or coastal, water[s], with a view to minimize deleterious effects of any water and land-use practice which might adversely affect aquatic habitats.

The Pan American Convention commits the contracting parties to the establishment of national reserves and wilderness areas to conserve and utilize natural resources for the protection of wildlife and plant life.

45. [1966] 1 U.S.T. 794, T.I.A.S. No. 4780. Article XI is as follows:

1. Representatives of the Contracting Parties named in the preamble to the present Treaty shall meet at the City of Canberra within two months after the date of entry into force of the Treaty, and thereafter at suitable intervals and places, for the purpose of exchanging information, consulting together on matters of common interest pertaining to Antarctica, and formulating and considering, and recommending to their Governments, measures in furtherance of the principles and objectives of the Treaty, including measures regarding:
  - (a) use of Antarctica for peaceful purposes only;
  - (b) facilitation of scientific research in Antarctica;
  - (c) facilitation of international scientific cooperation in Antarctica;
  - (d) facilitation of the exercise of the rights of inspection provided for in Article VII of the Treaty;
  - (e) questions relating to the exercise of jurisdiction in Antarctica;
  - (f) preservation and conservation of living resources in Antarctica.
2. Each Contracting Party which has become a party to the present Treaty by accession under Article XIII shall be entitled to appoint representatives to participate in the meetings referred to in paragraph 1 of the present Article, during such time as that Contracting Party demonstrates its interest in Antarctica by conducting substantial scientific research activity there, such as the establishment of a scientific station or the dispatch of a scientific expedition.
3. Reports from the observers referred to in Article VII of the present Treaty shall be transmitted to the representatives of the Contracting Parties participating in the meetings referred to in paragraph 1 of the present Article.
4. The measures referred to in paragraph 1 of this Article shall become effective when approved by all the Contracting Parties whose representatives were entitled to participate in the meetings held to consider those measures.
5. Any or all of the rights established in the present Treaty may be exercised as from the date of entry into force of the Treaty whether or not any measures facilitating the exercise of such rights have been proposed, considered or approved as provided in this Article.

of the principles of the Treaty. One of the areas agreed to be considered was preservation and conservation of living resources in Antarctica. As a result of this provision, substantial measures affecting the wildlife of Antarctica were agreed to in 1961, 1962, 1964, and 1966.<sup>46</sup>

This commitment to future agreement would be a desirable method of encountering the necessity of international agreement to protect habitat. It might also provide a way of handling other proposals which for one reason or another are not incorporated into this Convention. Humane transportation could well be left to future consideration in this manner. The most important effect of an Article IX type provision would be to keep the ball rolling—to commit the contracting parties to a continuing effort to protect and conserve endangered species of wildlife.

### *Conclusion*

The United States through its domestic law and international agreements has demonstrated its willingness to devote itself to the conservation of endangered species. Our Government has accepted, both unilaterally and in cooperation with other nations, regulations designed to protect these species from the adverse effect of indiscriminate international traffic. Under Section 5(b) of the Endangered Species Conservation Act of 1969 we have dedicated ourselves to pursue further international agreement in this area. Our purpose in seeking such accord is simple. We hope to bind as many other nations as possible to those obligations to which we have already bound ourselves.

This discussion has primarily involved the identification and consideration of deficiencies in the IUCN Draft. There are many strong points in the draft that could have been demonstrated as well. But if this country's goal is to extend our self-imposed obligations and concern for the conservation of endangered species to the rest of the international community, the deficiencies in the IUCN proposal should be corrected. At the same time, the United States can not impose its own obligations upon other sovereign nations. The scope of the Convention cannot exceed that to which the contracting parties will agree. Consequently, the effectiveness of American diplomatic efforts will substantially govern what is included in the Convention on the Export, Import, and Transit of Endangered Species.

*Barry Kowalski*

---

46. Measures in furtherance of Principles and Objectives of the Antarctic Treaty, T.I.A.S. No. 5094, T.I.A.S. No. 5274, T.I.A.S. No. 6058, and T.I.A.S. No. 6668.